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In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-593

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

vs.

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Respondents,

and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner
The Capitol
Albany, New York 12224
Telephone (518) 474-7178

SHIRLEY ADELSON SIEGEL
Solicitor General,
State of New York

ALAN W. RUBENSTEIN
Principal Attorney,
State of New York

of Counsel

Daily Record Corporation
Rochester, New York

(5305)

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Syracuse, New York

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NO.

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and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Blum*, in this cause in which plaintiff has been awarded welfare payments retroactively against a county social services commissioner, prays that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 13, 1979 and bearing such date, which affirmed the judgment of the United States District Court for the Western District of New York.

*The action had been commenced against Abe Lavine, then State Commissioner of Social Services. He has been succeeded in office and function by Barbara Blum. (Rule 48[3].)

Opinions Below

The decision and order of the District Court (JOHN T. CURTIN, DJ), dated February 1, 1979, which *inter alia* directed "The County defendant * * * to reimburse the plaintiff for public assistance benefits withheld * * *" and rejected plaintiff's "claim for damages against the state" is reported at 464 F.Supp. 718. It is set forth as Appendix "A".

The opinion for affirmance of the Court of Appeals, set forth as Appendix "B", has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered July 13, 1979 (Appendix "C").

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by *writ of certiorari* is 28 U.S.C. §1254(1).

Question Presented

Is not the respondent County Commissioner of Social Services entitled to immunity from an award of retroactive welfare payments as an arm of the State of New York (*Mt. Healthy City Board of Education v Doyle*, 429 US 274 [1977]) and a State defendant for purposes of the Eleventh Amendment (*Edelman v Jordan*, 415 US 651, 667, n 12 [1974])?

Constitutional Provisions and Statutes Involved

The Eleventh Amendment to the Constitution of the United States; Article XVII, Section 1 of the Constitution of the State of New York, 42 United States Code §602(a)(1)(3) and New York Social Services Law, §153 are reproduced as Appendix "D".

Statement of the Case

This case has been here twice before.

Certiorari was sought to review the judgment of the Court of Appeals (529 F2d 1294) holding that the complaint in this civil rights action (42 U.S.C. §1983) satisfied the jurisdictional requirement of substantiality of the constitutional claim presented. This Court denied certiorari sub nom. *Toia v Holley*, 426 US 954 (1976).

After remand, certiorari was again sought to review the judgment of the Court of Appeals (553 F2d 845) holding that plaintiff Holley is entitled to Aid to Families with Dependent Children (AFDC) because she is "permanently residing in the United States under color of law" within the provisions of 45 C.F.R. §233.50, a regulation of the Secretary of Health, Education and Welfare. This Court denied certiorari sub nom. *Shang v Holley*, 435 US 947 (1978).

Thus in this action plaintiff Holley has obtained that which she sought, to wit, inclusion of her needs in the family's AFDC grant.* In its remand, the Court of Appeals gave direction to the District Court. It held (553 F2d at 851):

> "There remains to be considered by the District Court the appropriate form of injunction as well as issues of

*The Immigration and Naturalization Service stated that plaintiff Holley "is illegally in the United States" and that "this service does not contemplate enforcing her departure from the United States at this time. Should the dependency of the children change, her case would be reviewed for possible action consistent with the circumstances then existing". The State Commissioner, by Decision After an Administrative Fair Hearing, had affirmed the action of the County Commissioner in removing plaintiff Holley from the family budget on the ground that she was an alien who was unlawfully residing in the United States and was not eligible for public assistance (New York Social Services Law § 131-k). Throughout this litigation we had urged that plaintiff was not "permanently residing in the United States under color of law" so as to be eligible under 45 C.F.R § 233.50 and that such regulation was vague.

damages, [cf. *Edelman* v. *Jordan*, 415 U.S. 651, 667, n. 12 (1974)] and attorney's fees both in the District Court and in this Court. [See Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559; *Torres* v. *Sachs*, 538 F.2d 10 (2nd Cir., 1976).]"

Decision and Order of the District Court After Remand (464 F.Supp. 718)

The District Court held that the State defendant was entitled to Eleventh Amendment immunity under *Edelman v Jordan*, 415 US 651 (1974).

As to the County Commissioner, however, a direction was issued requiring that he reimburse plaintiff for public assistance benefits withheld. The Court declined to apply the holding of the New York State Court Appeals in *Beaudoin v Toia*, 45 NY2d 343, 380 NE2d 246 (1978), that county commissioners of Social Services are arms of the State and applied its perception of the holding of this Court in *Mt. Healthy City Board of Education v Doyle*, 429 US 274 (1977). It held that the County Commissioner was not an arm of the State and was not entitled to Eleventh Amendment immunity. The Court stated that it found support in the Seventh Circuit decision in *Mackey v Stanton*, 586 F2d 1126 (7th Cir, 1978) where an Indiana social services district was denied Eleventh Amendment immunity as to support funds in its possession which it had collected. Finally the Court held that "[u]nder the federal A.F.D.C. program, each state is free to choose the administrative system most appropriate to its needs. *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620, 624 (2d Cir. 1972), *cert. denied*, 410 U.S. 944 (1973). A state that opts for direct state administration and financing presumably could assert the eleventh amendment as a complete bar to retroactive monetary liability in a case such as this. But New York has not chosen such a system." The Court rejected the State Commissioner's argument that under such

circumstances it would necessarily be capricious to withhold Eleventh Amendment immunity from a local social services district simply because New York had opted for local administration of its AFDC program.

Opinion of the Court of Appeals

The Court recognized the substantiality of defendants' arguments for County Commissioner immunity and stated that "one does not speak with confidence in this complex and difficult area."

It acknowledged the "great discretion" vested in the State Legislature in dealing with public assistance but gave weight to the fact that the Legislature had seen fit to create local social services districts which are required to furnish assistance and care. The Court, confining itself to the AFDC program, found that the fact of partial State funding was insufficient to invoke County Commissioner Eleventh Amendment immunity.*

The Court distinguished *Mackey v Stanton, supra*, as dealing "* * * with an Indiana county's diversion of court-ordered child support payments which, in the absence of its action, would have gone to the beneficiaries" (p A-26, *infra*, cert den., *sub nom., Stanton v Mackey*, ____ US ____, No. 78-1733, October 1, 1979). It concluded "[w]e believe that the Eleventh Amendment protection of the county defendant is not necessary 'in order to protect the state treasury from liability that would have * * * essentially the same practical consequences as a judgment against the State itself'", citing *Lake Country Estates, Inc. v*

*As will appear *infra*, 25% of the cost of AFDC is derived from State funds. As to home relief, a State program of public assistance, 50% of the cost is derived from State funds. The Court did not deal with the home relief aspect.

Tahoe Regional Planning Agency, ___ US ___, 99 S.Ct. 1171 (1979).*

Reasons for Granting the Writ

I

Whether the Commissioner of the Monroe County "Social Services District" (New York Social Services Law, §61) is a "state defendant" for purposes of Eleventh Amendment immunity (*Edelman v Jordan*, 415 US 651, 667, n 12 [1974]) is dependent on the nature of that entity and whether it is an arm of the State (*Mt. Healthy City Board of Education v Doyle*, 429 US 274 [1977]).**

The Monroe County Department of Social Services is a creature of state, not federal, law. Thus, we urge, its nature is to be determined as matter of State law.

Concern for the delivery of public assistance is reflected in the provision of the New York State Constitution that "[t]he aid,

*In its opinion and judgment, the Court also affirmed the granting of injunctive relief and the award of attorneys' fees. It dismissed a cross appeal by the plaintiff involving an attempt by plaintiff to obtain retroactive welfare payments as an adjunct to a direct action under the Fourteenth Amendment. Finally, in its discretion, the Court directed that "no additional amount for attorneys' fees and no costs be awarded to either party in connection with these appeals."

**The local agency here implemented the policy of higher authority in denying AFDC to plaintiff. *Monell v New York City Department of Social Services*, 436 US 658, 690 (1978) held that "[l]ocal governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where * * * the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Since local policy is not involved, we urge that the County Commissioner, like the State Commissioner, is not a section 1983 "person". Furthermore, plaintiff has obtained a judgment on a pendent statutory claim, not on a constitutional claim, thus further distinguishing this case from *Monell*.

care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." (Article XVII, Section 1.) The New York Court of Appeals has held that such provision "imposes upon the State an affirmative duty to aid the needy" and "provides the Legislature with discretion in determining the means by which this objective is to be effectuated * * *." (*Tucker v Toia*, 43 NY2d 1, 8, 371 NE2d 449, 452 [1977]; see also *Bernstein v Toia*, 43 NY2d 437, 449, 373 NE2d 238, 244 [1977] and *Lee v Smith*, 43 NY2d 453, 460, 373 NE2d 247, 250 [1977]).

Whatever "means" the Legislature might select to deliver public assistance in New York State could not diminish the force of Article XVII, Section 1 in establishing that the agency facilitating delivery is an "arm of the State."

"For the purpose of administration of public assistance and care the state shall be divided into county and city social services districts * * *" (New York Social Services Law §61). Thus Monroe County is "constituted a county social services district" (*id.*, §61[2]). The County Commissioners' responsibilities are administrative (*id.*, §65). Policy rule-making and general supervision are, however, for the State Commissioner and the State Department of Social Services (*id.*, §§17, 20, 34).

Clearly the responsibility for executing the State's program of public assistance rests with the State Commissioner and the Department which she heads. The Department of Social Services may deny or withhold State reimbursement for failure of a social services district to comply with departmental regulations (*id.*, §20[3][f]) and may approve or disapprove local rules, regulations and procedures (*id.*, §20[3][a]). At the suit of the State Commissioner the courts will require the appropriation of funds for social welfare programs administered by a county social services district by a county legislature. (*Toia v Regan*, 54 AD2d 46, 387 NYS2d 309 [4th Dept, 1976], affd 40 NY2d 837, 356 NE2d 276

[1976], app dism 429 US 1082 [1977]; *see also State Board of Social Welfare v City of Newburgh*, 28 Misc2d 539, 220 NYS2d 54 [Sup Ct, Orange Co, 1961]).

The New York Court of Appeals in *Beaudoin v Toia*, 45 NY2d 343, 380 NE2d 246 (1978) held (p 347)*:

> "In New York State, the social services program is a State program, administered through the 58 local social services districts under the general supervision of the State Department of Social Services and the State Commissioner of Social Services. (NY Const, art XVII, §1; Social Services Law, §§17, 20, 34.) The county commissioners are denominated by statute 'agents' of the State department (Social Services Law, §65, subd 3). In the administration of public assistance funds, whether they come from Federal, State or local sources, the authority and responsibility is that of the county commissioners of social services, not the counties; the local commissioners act on behalf of and as agents for the State. *Each is a part of and the local arm of the single State administrative agency.* Determinative of the present question is the status and function of the local commissioners as agents of the State and not of their respective counties."

and:

> "Inasmuch as the local commissioners are agents of the State department they may not substitute their interpretations of the regulations of the State department for those of the State department or the State commissioner * * *. To recognize any such right would be to undermine the supervisory authority of the State

*The *Beaudoin* Court expressly based its holding on State law. It referred to Federal law only as alternative rationale (45 NY2d at 348). The District Court, therefore, erred in limiting its holding to AFDC purposes (464 FSupp 718 at 723). Compare *Lindsay v Wyman*, 372 FSupp 1360 (SDNY, 1974), affd sub nom. *Beame v Lavine*, 419 US 806 (1974).

> commissioner and to invite administrative chaos. * * *" (Citations omitted, emphasis supplied.)*

Whether viewed from the perspective of State or Federal law, the result is the same — the Monroe County Department of Social Services is a State agency and an arm of the State.

This Court in *Mt. Healthy City Board of Education v Doyle, supra*, in holding that the local school board was ineligible for Eleventh Amendment immunity, had found that, under Ohio law, the board was included in the term "political subdivision". In the case at bar, the social services districts are not political subdivisions but "act on behalf of and as agents for the State" (*Beaudoin v Toia, supra*). In *Mt. Healthy*, this Court found that the local school board "is but one of many * * * within the State of Ohio" and "is subject to some guidance from the State Board of Education" (429 US at 280). Here the social services district is one of only 58 such districts in the State and it acts on behalf of the State (*Beaudoin v Toia, supra*). Unlike the local school board in *Mt. Healthy*, the social services districts have no independent powers to tax or to contract indebtedness.**

Clearly, in New York the local social services districts are "more like" an arm of the State than they are like a county or city (*Mt. Healthy City Board of Education v Doyle, supra*, 429 US at 280, 281), and the "balance" (p 280) favors clothing the defendant County Commissioner with the State's Eleventh Amendment immunity.

*Thus, it was held that local commissioners of social services have no standing to seek judicial review of Decisions After Fair Hearing. Subsequently the legislature conferred such standing, see New York Social Services Law § 22(9)(b) as added by Laws 1978, ch 473 that "[a]ny aggrieved party to an appeal, including a social services official provided an application by any such social services official has not been determined by any federal agency to be in violation of federal law, may apply for review as provided in article seventy-eight of the civil practice law and rules."

**These powers are vested in the County. See Social Services Law, §§ 88, 90, 93(3)(6), 92(1)(a)(c), *Toia v Regan, supra*, 54 AD2d at 50, 387 NYS2d at 312.

II

The effect of the judgment below is to provide plaintiff with access to the State Treasury contrary to the provisions of the Eleventh Amendment. For on May 9, 1979 a "Second Amended" judgment was entered which, *inter alia*, provided that "[p]laintiff have judgment against defendant, James Reed, as Commissioner of the Monroe County Department of Social Services, in the amount of FOURTEEN HUNDRED DOLLARS ($1,400.00) for public assistance benefits withheld as a result of the ineligibility determination at issue in this case." And there is no reason to assume that AFDC payments made to plaintiff by the County Commissioner in compliance with the Court's direction to pay will not be reimbursed by the State in the regular course of business.

State reimbursement is made under the provisions of New York Social Services Law, §153(1)(a)(d). The State reimburses local social services districts 50% of the amount expended for public assistance and care for local charges after deducting any Federal funds received or to be received. This formula, in general practice, results in the reimbursement of 75% of the cost of AFDC and 50% of the cost of home relief, as to which no Federal financial participation is available. "[T]his scheme fits well within the scope of our State Constitution's mandate * * *" (*Toia v Regan, supra*, 54 AD2d at 50, 387 NYS2d at 312).

And under that "mandate" New York social services districts are arms of the State.

The direction of the Courts below requiring payment of retroactive welfare payments to plaintiff has, we submit, "essentially the same practical consequences as a judgment against the State itself" (*Lake Country Estates v Tahoe Regional Planning Agency*, ___ US ___, 59 L.Ed. 2d 401, 410 [1979]) and is barred by the Eleventh Amendment (*Edelman v Jordan*, 415 US 651 [1974], *Mt. Healthy City Board of Education v Doyle, supra*, 429 US 274 [1977]).

III

In New York, social services programs, including AFDC, are administered through local social services districts, while in some other states, the state itself administers the program directly. A State AFDC plan must provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them. The program must either be administered by a single State agency or the administration of the plan must be supervised by a single State agency (Social Security Act, §402[a][1][3], [42 USC, §602(a)(1)(3)]).

In either event, the same Federal standards must be maintained, and it is the State that is responsible for maintaining them.

The question of whether a County Commissioner may be directed to reimburse a plaintiff for public assistance payments withheld could not arise in a state which administers the plan directly. It would necessarily be capricious to refuse to apply the bar of the Eleventh Amendment in the instant case simply because New York has opted for administration of the day-to-day aspects of its public assistance programs, including AFDC, at the local level.

The withholding of Eleventh Amendment County Commissioner immunity is, we urge, inconsistent with the State option afforded by the Social Security Act and the states' right to choose freely between direct and local administration (*Albany Welfare Rights Organization Day Care Center, Inc. v Schreck*, 463 F2d 620, 624 [2d Cir, 1972], cert den 410 US 944 [1973]).

IV

Beaudoin v Toia, supra, was briefed fully before the Court below, and it was urged that such construction of State law by the State Court of Appeals is binding upon the Federal judiciary, citing *Memorial Hospital v Mari-Copa County,* 415 US 250, 256 (1974). The opinion of the Court below, however, did not mention *Beaudoin.*

In *Plumas County Board of Supervisors, et al. v Califano,* 594 F2d 756 (9th Cir, 1979), cert pending, Docket No. 79-9, the Court of Appeals stated, as to the California AFDC program, "[t]he plan is county administered and state supervised, with the counties acting as agents for the state in making the prescribed payments" (594 F2d at 757). The Ninth Circuit Court of Appeals relied upon a State case as authority for that proposition.*

Plumas and the case at bar demonstrate the inconsistent approaches taken by different Circuit Courts in establishing the relationship of a County Social Services Agency to the State and furnish further reason for the granting of the Writ.

County of Marin v Martin, 43 Cal App 3d, 1, 3; 117 Cal Rptr, 364, 365 (1974). *Martin* in turn had relied, *inter alia,* upon *County of Contra Costa of Social Welfare Board,* 18 Cal Rptr 573 (1962) where it was held that the County function is to administer the California Aid to Needy Children program of public assistance "as an agency of the state and for the state's purposes" (18 Cal Rptr at 576).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Dated: Albany, New York
October 4, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner

SHIRLEY ADELSON SIEGEL
Solicitor General,
State of New York

ALAN W. RUBENSTEIN
Principal Attorney,
State of New York
of Counsel

Appendices

APPENDIX A

(Decision and Order of the District Court)

Entered in the Office of the Clerk of the United States District Court for the Western District of New York, February 1, 1979.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GAYLE McQUOID HOLLEY, Individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children.

Plaintiff,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants.

Civ-75-151

APPEARANCES:

K. WADE EATON, ESQ., Greater Upstate Law Project, Monroe County Legal Assistance Corporation, Rochester, New York, for Plaintiff.

ROBERT ABRAMS, ESQ., Attorney General of the State of New York (ALAN W. RUBENSTEIN, ESQ., of Counsel), Albany, New York, for Defendant State Commissioner.

CHARLES G. FINCH, ESQ., Chief Counsel (CHARLES G. PORRECA, ESQ., of Counsel), Rochester, New York, for

Defendant Commissioner of Monroe County Department of Social Services.

This case is before the court on remand from the Second Circuit to determine appropriate declaratory, injunctive and monetary relief. The plaintiff, a Canadian citizen, first entered the United States as a non-immigrant student. She subsequently gave birth to six children in this country. Sometime prior to August 1974, the plaintiff began receiving a grant of Aid to Families with Dependent Children [A.F.D.C.] for herself and her six children. In August 1974, the grant to plaintiff's household was reduced by one-seventh because a new state law and corresponding regulation rendered the plaintiff, an illegal alien, ineligible for assistance. N.Y. Soc. Serv. L. §131-K; 18 N.Y.C.R.R. §349.3. This determination was upheld by the Commissioner of the New York State Social Services Department on December 19, 1974 after an administrative fair hearing. The reduction was effective on January 15, 1975.

On April 17, 1975, the plaintiff, suing individually and on behalf of her six minor children, filed a complaint in federal district court against Abe Lavine, the Commissioner of the New York State Department of Social Services (the state defendant), and James Reed, the Commissioner of the Monroe County Department of Social Services (the county defendant), respectively. The complaint, alleging jurisdiction under 28 U.S.C. §§1343 and 1331, and 42 U.S.C. §1983, claimed that §131-K was inconsistent with the Social Security Act and federal regulations and deprived the plaintiff of due process and equal protection in violation of the fourteenth amendment. Plaintiff sought declaratory relief, an injunction, and damages for the amount of benefits denied her household as a result of the operation of the state statute. She also requested a preliminary injunction requiring defendant Reed to restore her household's benefit level to its prior level pending final disposition of this action.

Motions to dismiss were submitted by both defendants, and on July 30, 1975, Judge Burke dismissed this action "for lack of jurisdiction over the subject matter and because the complaint [failed] to state a claim upon which relief [might] be granted." The dismissal was based on Judge Burke's finding that the defendants were not within the scope of §1983, that the complaint asserted no substantial claim of unconstitutionality, and that the amount in controversy did not exceed $10,000, exclusive of interest and costs.

Judge Burke's dismissal of the complaint was reversed by the United States Court of Appeals for the Second Circuit in *Holley* v. *Lavine*, 529 F.2d 1294 (2d Cir.) (per curiam), *cert. denied*, 426 U.S. 954 (1976). The Second Circuit agreed that the amount in controversy did not exceed $10,000 and that consequently jurisdiction did not lie under 28 U.S.C. §1331. *Id.* at 1295. However, the court found that the complaint stated a substantial claim of unconstitutionality within the scope of §1983 and remanded the case to the district court to consider the plaintiff's statutory and regulatory claims and to convene a three-judge court, if necessary, pursuant to 28 U.S.C. §2281. *Id.* at 1296.

On remand, both defendants answered, and all parties moved for summary judgment. Judge Burke granted the defendants' cross-motions and denied the plaintiff's motion for summary judgment as well as her request to convene a three-judge court to hear the constitutional claims.

The plaintiff appealed and again the case was reversed and remanded in *Holley* v. *Lavine*, 553 F.2d 845 (2d Cir. 1977). The Court of Appeals found that since the plaintiff had official assurance that she would not be deported, at least until her children were no longer dependents, she was "permanently residing in the United States under color of law" within the meaning of the pertinent eligibility regulation promulgated under the Social Security Act. *Id.* at 851. It also stated that its

finding of inconsistency between state law and the applicable federal regulation mooted the issue as to whether state law, "if applied to preclude the payment of A.F.D.C. benefits to an alien not permanently residing lawfully in the United States, would violate the Fourteenth Amendment to the United States Constitution." *Id.* Accordingly, the court held that there was no reason to convene a three-judge court to consider plaintiff's constitutional claims. The case was again remanded to the district court with the following instructions:

> There remains to be considered by the District Court the appropriate form of injunction as well as issues of damages, [cf. *Edelman v. Jordan*, 415 U.S. 651, 667, n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)] and attorney's fees both in the District Court and in this Court. [See Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641; *Torres v. Sachs*, 538 F.2d 10 (2nd Cir. 1976).]
>
> Since it appears the original judge might have difficulty in putting aside previously expressed views, and reassignment is advisable to avoid the appearance of prejudgment, the case will be remanded to the District Court for reassignment in keeping with the principles stated in *United States v. Robin*, 553 F.2d 8, 10 (2nd Cir., March 30, 1977).
>
> Reversed and remanded for the issuance of an appropriate injunction, and for consideration of issues of damages and attorney's fees both in the District Court and in this Court.

Id.

On remand, the case was assigned to my part for determination of appropriate relief. The plaintiff seeks a declaration of the invalidity of the statute and an injunction against its enforcement as well as an award of damages, counsel fees, and litigation costs. The damages sought consist of the funds withheld from the plaintiff's public assistance grant as a result of defendant's decision of August 20, 1974.

The issues have been thoroughly briefed by all of the parties. Oral argument was held on May 23, 1978. On August 9, 1978, upon stipulation of the parties, reargument was held in light of the Supreme Court's recent decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (holding that local governing bodies are subject to suit as "persons" under §1983), and *Hutto v. Finney*, ____ U.S. ____ (1978) (holding that 42 U.S.C. §1988 does not violate the eleventh amendment), and the Second Circuit's decision in *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978).[1] In addition, supplemental briefs were filed with the court. After carefully considering the positions of the parties, I am prepared to rule on the plaintiff's request for relief.

I. *DECLARATORY AND INJUNCTIVE RELIEF*

The Second Circuit in its second decision found that N.Y. Soc. Serv. Law §131-K was inconsistent with the controlling federal regulation, 45 C.F.R. §233.50, because §131-K denied public assistance to New York residents "permanently residing in the United States under color of law." 553 F.2d at 851. Since it also stated that the plaintiff's status was highly unusual, in that she was an illegal alien with official assurance that she would not be deported, the defendants urge the court to limit declaratory and injunctive relief to the facts of this case. But in light of the Second Circuit's determination of inconsistency, I find no basis for doing so. *Cf. Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). Accordingly, §131-K is declared invalid insofar as it denies public assistance to New York residents permanently residing in the United States under color of law, and the defendants are permanently enjoined from enforcing the statute.

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[1]This case was vacated by the Supreme Court and remanded for reconsideration in light of *Monell v. Department of Social Services, supra. West Haven v. Turpin*, 47 U.S.L.W. 3368 (U.S. Nov. 28, 1978). *See* discussion *infra.*

II. *DAMAGES*

A more difficult question is whether the plaintiff is entitled to recover retroactive welfare payments from the defendants. The plaintiff argues that damages can be awarded on a number of theories. For the reasons outlined below, I find that the state defendant is shielded from a damage award by the eleventh amendment, but that the county defendant is liable for retroactive payments.

A. *STATE DEFENDANT*

The first theory asserted by the plaintiff against the state is that benefits withheld after the complaint was filed on April 17, 1975 can be awarded as ancillary to injunctive relief. In *Edelman v. Jordan,* 415 U.S. 651, 668 (1974), however, the Supreme Court refused to characterize the damages sought in that case as a form of "equitable restitution," recoverable under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), without regard to the eleventh amendment. *D'Iorio v. County of Delaware,* No. 77-1241 (E.D. Pa. Feb. 22, 1978), to the extent it holds otherwise, appears to be inconsistent with *Edelman. Mauclet v. Nyquist,* 406 F.Supp. 1233, 1236 (W.D.N.Y. 1976), did not expressly consider whether requalification of the plaintiff as a regents scholarship recipient as of the date the complaint was filed violated *Edelman.*

With the benefit of hindsight, it is clear that most of plaintiff's damages could have been avoided if the district court had correctly applied the law at the time that the plaintiff moved for preliminary relief. But this does not change the retroactive nature of a damage award at this stage of the proceedings. The plaintiff is not seeking a payment of state funds as a necessary consequence of future compliance with a federal court order but rather an award of public assistance payments wrongfully withheld in the past. This type of relief is barred by *Edelman.*

The second theory urged by the plaintiff is that she can recover all benefits wrongfully withheld from January 15, 1975 to April 27, 1977 without regard for the eleventh amendment under the cause of action alleged in the complaint directly under the fourteenth amendment. In support of this theory, the plaintiff cites *Turpin v. Mailet, supra,* which held that a remedy may be implied from the protective provisions of §1 of the fourteenth amendment and that monetary relief is one of the remedies available.

Since oral argument, however, *Turpin* was vacated by the Supreme Court and remanded for consideration in light of *Monell v. Department of Social Services, supra. West Haven v. Turpin,* 47 U.S.L.W. 3368 (U.S. Nov. 28, 1978). On remand, the Second Circuit concluded that

> under the very rationale of our prior opinion — there is no place for a cause of action against a municipality directly under the 14th Amendment, because the plaintiff may proceed against the City of West Haven under §1983.

Turpin v. Mailet, No. 77-7345, slip op. at 5405 (2d Cir. Jan. 16, 1979). An additional difficulty with this argument is that it would require a finding of jurisdiction under 28 U.S.C. §1331, which the Second Circuit rejected on the first appeal of this case because the amount in controversy did not exceed $10,000. 529 F.2d at 1295. On remand, this court is bound by the Second Circuit's ruling.

A third theory asserted by the plaintiff rests on the Supreme Court decisions in *Monell, supra* and *Finney, supra.* In light of *Monell,* the plaintiff now has a cause of action under §1983 against the state and county agencies. Based on *Finney,* the plaintiff argues that §1983, like §1988, is a statute which abrogates eleventh amendment immunity.

This argument assumes that *Edelman* has been overruled *sub silento* by the Supreme Court. However, two circuit courts which have considered this question in the wake of *Monell* and *Finney* have concluded that *Edelman* continues to bind federal courts absent a clearer statement from the Supreme Court allowing damage actions against the states under §1983. *Skehan v. Board of Trustees*, 47 U.S.L.W. 2441 (3d Cir. Dec. 21, 1978); *Bogard v. Cook*, No. 76-2890, slip op. at 1534 (5th Cir. Dec. 15, 1978). These conclusions are fully supported by the opinions in *Monell* and *Finney*.

Monell, which found that a local school board was a "person" under §1983, expressly states that its holding is "limited to local government units which are not considered part of the State for Eleventh Amendment purposes." *Supra* at 690 n.54. The reasoning in *Monell* is equally applicable to state agencies and it may be fairly read to subject state agencies to injunctive relief under §1983, but at no point does the decision authorize an award of retroactive damages against the state.

In *Finney*, at least one member of the Court has indicated that the "foundations" of *Edelman* have been "significantly undermined." *Supra* at ____ (J. Brennan, concurring). But the majority opinion cites *Edelman* with approval and characterizes awards of attorneys' fees as noncompensatory litigation costs in order to avoid a conflict between the two cases. Moreover, four of the Justices dissent on the ground that *Edelman* precludes an award of attorneys' fees under 42 U.S.C. §1988. Although the present court does not agree on the proper interpretation of the eleventh amendment, it cannot be said that *Edelman* has been implicitly overruled. I therefore must reject the plaintiff's claim for damages against the state.

B. *COUNTY DEFENDANT*

Different considerations apply in determining whether the plaintiff can recover damages from the county defendant. As a general rule, eleventh amendment immunity does not extend to counties and other local government units. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 717-721 (1973). This was recognized by the Supreme Court in *Edelman, supra* at 667 n.12. Only if the county or similar municipal corporation is acting as an arm of the state does it share the state's immunity. *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). This rule is equally applicable to agencies of the county, such as local departments of social services and their commissioners.

The question at issue here is whether the state is the real party in interest in the action against the county commissioner and is determined by examining "the nature of the entity created by state law." *Mount Healthy, supra.* A number of factors have been considered by the courts. *Gallagher v. Evans*, 536 F.2d 899, 901 (10th Cir. 1976); *George R. Whitten, Jr., Inc. v. State University Construction Fund*, 493 F.2d 177, 179-80 (1st Cir. 1974); *Urbana v. Board of Managers*, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970); *Krisel v. Doran*, 258 F. Supp. 845, 849 (S.D.N.Y. 1966), *aff'd per curiam*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968). However, the primary consideration in all of the cases, including *Mount Healthy*, is the extent to which the local agency or official is financially independent of the state. *See also Rothstein v. Wyman*, 467 F.2d 226, 236 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973). In *Edelman, supra* at 663, 665, the question was phrased in terms of whether a judgment against the defendant would inevitably be satisfied out of the general revenues of the state. This determination is a matter of federal law, and federal courts are not necessarily bound by state court decisions. *See, e.g., Savage v. Kibbee*, 426 F. Supp. 760, 765 (S.D.N.Y. 1976).

The plaintiff does not dispute that county social services departments are "arms of the state" for the purpose of administering federal welfare programs. This was established recently by the New York Court of Appeals in *Beaudoin v. Toia*, 45 N.Y.2d 343, 408 N.Y.S.2d 417 (1978), which held that a county department of social services has no standing to challenge a fair hearing decision of the State Commissioner of Social Services. Federal law in fact requires this result. 42 U.S.C. §602(a).

But this does not resolve the issue. It is also well established that a judgment against a county department of social services or its commissioner in his official capacity does not bind the state and is not automatically payable out of state funds. *Toia v. Regan*, 387 N.Y.S.2d 309 (App. Div. 4th Dep't), *aff'd per curiam*, 40 N.Y.2d 837, 387 N.Y.S.2d 832 (1976); *Jones v. Berman*, 37 N.Y.2d 42, 371 N.Y.S.2d 422 (1975). The relationship between the state and the county agencies has been described in the following terms:

> Erie County is a duly established county social services district (Social Services Law, §§52, 61[3]). As such, it bears ultimate responsibility for the administration of public assistance and care for its residents although it may share this responsibility, under certain circumstances, with other municipalities located within its territorial boundaries (Social Services Law, §69). An important element of this responsibility is the mandatory duty of the County's board of supervisors "to make adequate appropriations * * * to provide the public assistance and care required by * * * [the Social Services Law]" (Social Services Law, §88). Additionally, the County is specifically obligated to make deficiency appropriations, should the need arise, to fulfill its public assistance responsibilities with regard to both home relief (Social Services Law, §93[3], [6]) and the federally-aided programs of aid to dependent children and medical assistance (Social Services Law, §92[1] [a], [c]). The Social Services Law does provide for reimbursement by the State for fifty percent of the nonfederally reimbursed cost of these programs, including day care (Social Services Law, §§153[1] [d], [e], 368-a[1] [d], 410-c[1] [a]). Further, the statute places the power over the administration and regulation of this system of public assistance and care largely in the hands of the State Department of Social Services and its Commissioner (Social Services Law, §§17, 20, 34).
>
> [1] This legislative scheme, then, focuses day-to-day administrative duties upon the county social services districts while concentrating policy and rule-making authority in the state agency. It also establishes an affirmative burden upon the county social services districts to appropriate necessary funding for the operation of these public assistance programs but, then, eases this burden by providing for fifty percent state reimbursement of all such funding not otherwise subject to federal reimbursement.

Toia v. Regan, 387 N.Y.S.2d at 312.[2]

Under this scheme, county governments have an obligation to finance public assistance payments even if higher levels of government refuse to reimburse the county. *See, e.g., Jones v. Berman, supra.* Although in most cases state and federal funding is available for reimbursement, there is no clear rule requiring the state to indemnify the counties for judgments entered against them. Moreover, only fifty percent of the nonfederal share of public assistance payments under the A.F.D.C. program is reimbursed by the state. For these reasons, I find that the county defendant is not an arm of the state for eleventh amendment purposes.

This conclusion is supported by the Seventh Circuit's decision in *Mackey v. Stanton*, No. 78-1513 (7th Cir. Nov. 8, 1978), the only case directly in point brought to the court's attention. On

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[2]The references to Erie County are equally applicable to Monroe County.

similar facts, the court found that an award of retroactive public assistance benefits could be entered against a county social services agency and its officials in Indiana. It reached its conclusion by applying the analysis used by the Supreme Court in *Mount Healthy* to Indiana's funding scheme. Summarizing its analysis, the court stated:

> In all respects that the Supreme Court seemed to consider significant in Mt. Healthy, the county department here is similar to the school board in that case. Although both are subject to state supervision and depend heavily on state funds, they perform their duties on a local level. More important, both have the power to raise their own funds by tax levy and by bond issuance. Significantly, Ind. Code Ann. §12-1-11-13 (Burns) is analogous to Ohio Rev. Code Ann. §133.27 (Page), providing a manner for payment of judgments without resort to the state treasury.

Although the New York scheme differs from Indiana's in that county social services departments in New York must rely on local legislative bodies for funding, the power and the duty to raise and appropriate welfare funds nevertheless rest at the local rather than the state level. The only other significant difference between the New York and the Indiana schemes makes it clear that counties in New York are less dependent on state funds than counties in Indiana. Only 50% of non-federal funds paid to A.F.D.C. recipients in New York are reimbursed by the state whereas in Indiana the state reimburses the counties for 100% of their expenditures. In New York, it cannot even be said that a judgment against the county social services commissioner is indirectly payable out of state funds.

Although it may seem unfair to hold local communities responsible for funding public assistance and for paying court-ordered awards of retroactive assistance at the same time that administrative policies are dictated by the state and federal

governments, any unfairness is a consequence of the New York legislature's decision to place the responsibility for funding public assistance on the localities. The constitutionality of this scheme was upheld by the New York Court of Appeals in *Toia v. Regan, supra.* Under the federal A.F.D.C. program, each state is free to choose the administrative system most appropriate to its needs. *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck,* 463 F.2d 620, 624 (2d Cir. 1972), *cert. denied,* 410 U.S. 944 (1973). A state that opts for direct state administration and financing presumably could assert the eleventh amendment as a complete bar to retroactive monetary liability in a case such as this. But New York has not chosen such a system.

The county defendant is directed to reimburse the plaintiff for public assistance benefits withheld as a result of the ineligibility determination at issue in this case.

III. *ATTORNEY'S FEES*

The final issue before the court is the plaintiff's entitlement to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. For the reasons stated below, I find that the defendants are liable for a fee award under §1988.

The Supreme Court's decision in *Finney* squarely rejected the main argument raised by the defendants against an award by holding that the eleventh amendment does not bar an award of attorneys' fees or costs against the state in §1983 actions. The defendants now argue that it would be unfair to penalize them for their good faith efforts to implement the federal regulation, which they claim is ambiguous.

In §1983 cases, fees should ordinarily be awarded to successful plaintiffs unless special circumstances would make such an award unjust. *Mid-Hudson Legal Services v. G. & U., Inc.,* 578

F.2d 34, 37-38 (2d Cir. 1978). *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), outlines the underlying factors to be considered in applying the *Newman-Northcross* rule to attorney's fees applications in §1983 actions. These factors, when applied to this case, support the plaintiff's position.

The plaintiff sought and obtained broad equitable relief which will benefit resident aliens in addition to the plaintiff. Although the size of the group affected by this litigation may not be large, the claim involved significant federal rights. Because the plaintiff's claim did not involve substantial monetary damages and is one which many United States citizens would regard as unpopular, it is highly unlikely that the plaintiff could have retained other counsel to act on her behalf. The cost of this litigation and the time and effort required by plaintiff's counsel in order to bring the case to its conclusion, especially in light of the two appeals involved, plainly were disproportionate to any sum the plaintiff might reasonably have expected to recover on her own behalf. All of these circumstances justify an award of fees to the plaintiff. *Zarcone, supra; Mauclet v. Nyquist*, No. 75-73 (W.D.N.Y. Oct. 20, 1978).

The defendants have failed to point to any circumstances which would render an award unjust. Good faith alone does not preclude an award of attorney's fees. *Mid-Hudson, supra.* The risk of incurring liability for good faith mistakes in interpreting federal requirements is one of the risks which the state assumes when it participates in the federal A.F.D.C. program. Although the defendants argue that the federal regulation involved in this case is ambiguous, this litigation might have been avoided had the state enacted the federal language.

Finally, it is well established that attorneys who provide legal services for free or for nominal rates are nevertheless entitled to recover fees under §1988. *See, e.g., Mid-Hudson, supra; Beazer v.*

New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977). In light of all of these considerations and in the exercise of my discretion, I find that the plaintiff's motion for attorneys' fees should be granted.

The parties are directed to meet and attempt to agree upon a reasonable amount of a fee award and to report to the court in thirty (30) days from the date of this order.

So ordered.

/s/ JOHN T. CURTIN
United States District Judge

DATED: February 1, 1979

APPENDIX B

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1152, 1153, 1154 — August Term, 1978.

(Argued June 1, 1979 Decided July 13, 1979.)

Docket Nos. 79-7182, 79-7190, 79-7207

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Plaintiff-Appellee-Cross-Appellant,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellants-Cross-Appellees.

Before:

FRIENDLY and FEINBERG, *Circuit Judges*, and NEAHER, *District Judge.* *

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*Hon. Edward R. Neaher, of the United States District Court for the Eastern District of New York, sitting by designation.

APPENDIX B (Opinion of the Court of Appeals)

Appeal and cross-appeal from judgment of United States District Court for the Western District of New York, John T. Curtin, Ch. J., awarding retroactive welfare benefits against a County Commissioner of Social Services, denying such an award against a State Commissioner of Social Services, enjoining in part application of a State Social Services law and awarding attorneys' fees to plaintiff against both the County and State Commissioners of Social Services.

Judgment affirmed and cross-appeal dismissed.

K. WADE EATON, Rochester, N.Y. (Greater Up-State Law Project, Rochester, N.Y.), *for Plaintiff-Appellee-Cross-Appellant Gayle McQuoid Holley.*

ALAN W. RUBENSTEIN, Principal Attorney, Albany, N.Y. (Robert Abrams, Attorney General of the State of New York, Jeremiah Jochnowitz, Assistant Solicitor General, Albany, N.Y., of Counsel), *for Defendant-Appellant-Cross-Appellee Abe Lavine, Commissioner of the New York State Department of Social Services.*

CHARLES G. PORRECA, Rochester, N.Y. (Monroe County Department of Social Services, Sam DiLalla, Acting Chief Counsel, of Counsel), *for Defendant-Appellant-Cross-Appellee James Reed, Commissioner of the Monroe County Department of Social Services.*

FEINBERG, *Circuit Judge:*

This case raises difficult issues of application of the Eleventh Amendment in suits involving welfare benefits. For reasons given below, we affirm a district court judgment that awards plaintiff such benefits retroactively against a County Social Services Commissioner, denies such an award against a State

Social Services Commissioner and awards counsel fees to plaintiff against both defendants.

In April 1975, Gayle McQuoid Holley, individually and on behalf of her six children, sued Abe Lavine, then Commissioner of the New York State Department of Social Services, and James Reed, then Commissioner of the Monroe County Department of Social Services, in the United States District Court for the Western District of New York.[1] Plaintiff Holley was then (and presumably still is) an "illegal" alien, but her six children are all American citizens, since they were born in this country. Although plaintiff came here illegally, the Immigration and Naturalization Service for humanitarian reasons has allowed plaintiff to remain in this country, to prevent the separation of mother and children. Plaintiff's complaint sought an order requiring defendants to restore a one-seventh cut in benefits under the Aid to Families with Dependent Children (AFDC) program and invalidating section 131-k of the New York Social Services Law, insofar as it deprives certain illegal aliens of AFDC benefits.[2] In the period since plaintiff filed her complaint

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[1]For convenience only, we will call the County Commissioner the County defendant and the State Commissioner the State defendant.

[2]New York Social Services Law §131-k provides:

1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance.

2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall be immediately referred to the United States immigration and naturalization service, or the nearest consulate of the country of the applicant or the recipient for such service or consulate to take appropriate action or furnish assistance.

over four years ago, her case has twice been in both this court and in the Supreme Court, and she now appears here for the third time, on this occasion as appellee and cross- appellant. A brief summary of what has transpired follows:

In July 1975, the district court dismissed plaintiff's complaint for lack of jurisdiction and for failure to state a claim on which relief might be granted. This court reversed, holding that plaintiff had alleged a constitutional claim under 42 U.S.C. § 1983 substantial enough to confer jurisdiction under 28 U.S.C. § 1343(3). Holley v. Lavine, 529 F.2d 1294 (2d Cir.) (per curiam), cert. denied, 426 U.S. 954 (1976). Plaintiff's constitutional claim is that denial of AFDC benefits fairly discriminates against those few "illegal" aliens in her unusual situation, denying equal protection of the laws to her own right and to her six children who, although citizens, are also penalized by the reduction in household benefits. In our prior opinion, we noted that while only a three-judge court could, under the law at that time, decide this claim, plaintiff also alleged that section 131-k conflicts both with provisions of the Social Security Act[3] and with an HEW regulation.[4] The basis of this claim was that these require aid to be given to otherwise eligible persons who are aliens "lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law" and that plaintiff resides here "under color of law," because the immigration authorities have allowed her to stay. 529 F.2d at 1296. We further observed that the district court had "pendent jurisdiction" over these "claims of conflict between New York State and federal law," which a single district judge could decide. Id.

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[3]42 U.S.C. §§601, 602(a)(10) and 606(b)(1).

[4]45 C.F.R. §233.50.

We remanded the case to the district court where all parties moved for summary judgment. The district court again decided for defendants, this time on the ground that the New York statute did not conflict with the Social Security Act and the regulation. Plaintiff appealed to this court, and we again reversed the judgment of the district court. Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied. 435 U.S. 947 (1978). We pointed out that "plaintiff is in what is almost certainly a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter [from the Government] stating that [it] 'does not contemplate enforcing . . . [the alien's] . . . departure from the United States at this time.'" 553 F.2d at 849. We went on to hold that in this

> unusual situation where an alien parent has an official assurance that the parent will not be deported at least until the children are no longer dependent on that parent, such parent is "permanently residing in the United States under color of law."

Id. Therefore, section 131-k was, at least as applied to plaintiff Holley and her class, in conflict with the governing federal law, and the reduction in benefits was improper. On this theory, it was unnecessary to decide the equal protection issue. We again remanded the case to the district court (assigning it to another judge) to consider the appropriate form of injunction and issues of damages and attorneys' fees. 553 F.2d at 851.

In the district court, the case was reassigned to Chief Judge John T. Curtin. After further argument and briefing, the judge granted plaintiff's motion for a permanent injunction against enforcement of the applicable portion of section 131-k, directed the County defendant "to reimburse the plaintiff for public assistance benefits withheld as a result of the ineligibility determination."[5] and awarded plaintiff counsel fees against both

[5]The amount of plaintiff's damages was subsequently fixed at $1,400 in an amended judgment.

the State and County defendants.[6] However, on Eleventh Amendment grounds, the judge denied plaintiff an award of retroactive benefits against the State defendant. Judge Curtin's thorough opinion is reported at 464 F. Supp. 718 (W.D.N.Y. 1977). On this third appeal to this court, the County defendant argues that the Eleventh Amendment also bars an award of benefits against him, as does the defense that he acted in good faith. Both defendants also offer various reasons why the grant of attorneys' fees is not proper. Plaintiff cross-appeals, arguing that she should have been awarded back payments against the State defendant as well as against the County defendant, and offers an elaborate alternative theory to justify that result.

Appeal of the County Defendant

The district court held that the Eleventh Amendment did not bar an award of retroactive AFDC benefits to plaintiff against the County defendant. That Amendment, which has received increased judicial attention in the last decade, provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that the Amendment prohibited that portion of a federal district court's decree that ordered Illinois state officials to pay

[6]We are advised that the parties have agreed that the proper amount of attorneys' fees is $10,000. Under the circumstances, we are not disposed to take too technical a view on whether there now is an appealable final judgment under 28 U.S.C. §1291. Cf. Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 70 n.2 (2d Cir. 1973); Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978).

retroactive public assistance benefits.[7] In this case, Judge Curtin relied on *Edelman v. Jordan* in refusing to grant damages against the State defendant but went on to hold that the County defendant is not an arm of the State for purposes of Eleventh Amendment immunity. The correctness of this ruling is the key issue on the County defendant's appeal.

We start with the proposition reaffirmed in Edelman v. Jordan, supra, 415 U.S. at 667 n.12, that "a county does not occupy the same position as a State for purposes of the Eleventh Amendment." The same footnote states that "while county action is generally state action for purposes of the Fourteenth Amendment," as plaintiff alleged here in her section 1983 action, "a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment." Id. Subsequently, in Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274, 280 (1977), the Court characterized the relevant issue as whether the School Board defendant there was "to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or . . . as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." In the same passage the Court also stated that "[t]he bar of the Eleventh Amendment . . . does not extend to counties and similar municipal corporations." Since defendant James Reed, as Commissioner of the Monroe County Department of Social Services, is concededly an employee of Monroe County, it is arguable that this fact, under the Court's criteria, resolves the issue here. But defendants argue that local social services agencies, unlike counties, are considered to be "arm[s] of the

[7]The benefits were provided under federal-state programs of Aid to the Aged, Blind or Disabled (AABD). For Eleventh Amendment purposes we see no distinction between the AABD benefits in that case and the AFDC benefits here.

State" since they are a part of, and supervised by, the State Department of Social Services.[8]

Defendants stress that in *Mt. Healthy*, supra, 429 U.S. at 280, the Court pointed out that the answer to the Eleventh Amendment inquiry "depends, at least in part, upon the nature of the entity created by state law." According to defendants, we must first look to the New York State constitution, which provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. Const. art. 17, § 1. Thus, as defendants contend, the state legislature has been given the power under state law to control the public welfare system and to determine the manner and means of providing public assistance to the people in the state. The state legislature has divided the state into "county and city social services districts," N.Y. Soc. Serv. Law § 61, of which Monroe County is one. And the responsibilities of a commissioner of a County Department of Social Services, like defendant James Reed here, are essentially to administer, N.Y. Soc. Serv. Law § 65, rather than to make, policy. Defendants tell us that the Monroe County Department of Social Services differs from other Monroe County departments because it has its own legal staff to handle welfare matters exclusively and, unlike the County of Monroe itself, is truly "an arm of the State."

These are substantial arguments, and one does not speak with confidence in this complex and difficult area. See generally Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139 (1977). It is true that the state constitution gives great discretion to the state legislature in dealing with public

[8]The State and County defendants offer similar arguments on this issue. For convenience, we will consider together the contentions of both defendants and not distinguish between them.

assistance. But that legislature has seen fit to create local social service districts, which are required by law to provide for the "assistance and care of any person . . . who is in need of public assistance and care which he is unable to provide for himself." N.Y. Soc. Serv. Law § 62(1). Moreover, section 88 of the New York Social Services Law makes it "the duty of the board of supervisors of a county, the town board of a town and the appropriating body of a city to make adequate appropriations and to take such an action as may be necessary to provide the public assistance and care required by this chapter." Although it is not completely clear from this language that "the public assistance and care required by this chapter" includes participation in the federally-assisted AFDC program as distinguished from general welfare payments, this seems to be assumed in Jones v. Berman, 37 N.Y.2d 42 (1975). That the State controls the policies of the County Department of Social Services is not decisive on the Eleventh Amendment issue. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 99 S.Ct. 1171, 1177 (1979), the Court noted that it has "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" Of much greater significance is the entity upon whom rests the primary obligation to make payments to the AFDC recipient, and as discussed below, that entity appears to be the County.

In minimizing the County's obligation, defendants emphasize that only 25 percent of the AFDC program is ultimately funded by the County, since 50 percent is paid for by the federal government and 25 percent by the State. If anything, this cuts against defendants' argument. It is one thing to indulge in the semi-fiction that a state needs Eleventh Amendment protection for the full amount of a judgment against a state commissioner for past AFDC benefits, when half of the money will come back

to the state from the federal government. The argument becomes strained when the judgment is against the County defendant and the State will eventually bear only 25 percent of the total. Defendants also argue that if New York State had chosen, as some states do, to administer public assistance payments directly rather than through county social services districts, the Eleventh Amendment would have been a bar and it is therefore capricious not to apply it here. But, as Judge Curtin correctly pointed out, "any unfairness is a consequence of the New York legislature's decision to place the responsibility for funding public assistance on the localities," 464 F. Supp. at 725.

Defendants also stress that the State advances money to the County in anticipation of reimbursable local expenditures for public assistance and care. But this is a matter of administrative convenience. It seems to us more important that the County defendant would be liable to an AFDC recipient even if the State did not advance the money. Monroe County has its own taxing authority, N.Y. Const. art. 8, § 10; N.Y. County Law §§ 233, 233-a(1) (4), is an independent political entity, N.Y. County Law, § 3, appoints the local County commissioner who is a defendant here, County Law §400(4) (b), and bears "ultimate responsibility" for public assistance payments. Toia v. Regan, 54 A.D.2d 46, 50 (4th Dept.), aff'd, 40 N.Y.2d 837 (1976), appeal dismissed, 429 U.S. 1082 (1977). Moreover, "the county's duty to provide assistance is not dependent upon the receipt of equivalent money from the State and the cases have so held." Jones v. Berman, supra, 37 N.Y.2d at 55. That the State chooses to reimburse the County defendant for 25 percent of the total retroactive payment should not be controlling on this issue.[9] We believe that Eleventh

[9]Judge Curtin noted that:

> Although in most cases state and federal funding is available for reimbursement, there is no clear rule requiring the state to indemnify the counties for judgments entered against them.

464 F. Supp. at 724.

Amendment protection of the county defendant is not necessary "in order to protect the state treasury from liability that would have ... essentially the same practical consequences as a judgment against the State itself." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra, 99 S.Ct. at 1177.[10] Under all the circumstances, we conclude that the County defendant should not be treated as "an arm of the State" for Eleventh Amendment purposes.

The remaining contentions of the County defendant require less extended discussion. The claim is made that since the County Commissioner acted in good faith in relying on section 131-k, under such cases as Wood v. Strickland, 420 U.S. 308 (1975), and O'Connor v. Donaldson, 422 U.S. 563 (1975), he should not be held liable. This defense was developed so that a public official, bound to take discretionary action of many sorts, often on short notice, should not be burdened by liability or fear of it because "of mistakes made in good faith in the course of ... his official duties," Wood v. Strickland, 420 U.S. 308, 319 (1975) (school officials); O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975) (employee of state mental hospital); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347-48 (Medina, J.), 1348-49 (Lumbard, J.) (2d Cir. 1972) (on remand) (narcotics

[10] Plaintiff and defendants each cite to us a different decision of the Seventh Circuit in support of their positions. In Mackey v. Stanton, 586 F.2d 1126 (7th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3776 (May 17, 1979) (No. 78-1733), the court held the Eleventh Amendment did not bar a judgment against a county's welfare department. Conversely, in Carey v. Quern, 588 F.2d 230 (7th Cir. 1978), the Amendment was a bar. We regard these Seventh Circuit cases as inconclusive and distinguishable. *Mackey* dealt with an Indiana county's diversion of court-ordered child support payments which, in the absence of its action, would have gone to the beneficiaries, in *Carey v. Quern*, the public assistance taxes collected by the City of Chicago were paid into a special purpose trust fund and amounted to only five percent of total disbursements, the rest "supplied by the State of Illinois." 588 F.2d at 233 n.5.

agents). Here, as we now know after years of litigation, Reed had no discretion; the money belonged to Mrs. Holley. There can be no good faith defense to a claim for AFDC benefits that have been found to be due and owing. Moreover, there should be no good faith defense to a claim for AFDC benefits that were wrongfully withheld, since such an award puts defendants in no worse position than if they had initially complied with their obligation. See Schnapper, Civil Rights Litigation After *Monell*, 79 Colum. L. Rev. 213, 252 (1979). Such benefits seem quite different from damages under 42 U.S.C. § 1983 for violation of constitutional rights of the sort involved in Monell v. Department of Social Services, 436 U.S. 658 (1978), in which the Supreme Court alluded to the possibility of "some sort of official immunity" for "local government bodies." Id. at 701.[11]

Finally, even if the Eleventh Amendment does not apply, we are urged to deny retroactivity under the criteria listed in the alternative holding in Rothstein v. Wyman, 467 F.2d 226, 232-36 (2d Cir. 1972), cert. denied, 411 U.S. 92 (1973). We do not regard the district court's rejection of this argument as "an improvident exercise of its equity powers," id. at 236, in view of the insubstantial fiscal effect of giving a remedy to plaintiff's "minuscule sub-class" and the recognition by the New York courts of the propriety of retroactive relief in welfare benefits

[11] At the end of his opinion for the majority, Justice Brennan stated:

> Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under §1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under §1983 "be drained of meaning," *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974). Cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397-98 (1971).

436 U.S. at 701.

cases. See Uhrovick v. Lavine, 43 A.D.2d 481, 484 (3d Dept.), aff'd, 35 N.Y.2d 892 (1974) ("to do otherwise would permit a State to violate Federal requirements with financial impunity . . . ."); Martin v. Lavine, 47 A.D.2d 731 (1st Dept. 1975), modified on other grounds, 39 N.Y.2d 72 (1976); Stewart v. Smith, 57 A.D.2d 897, 898 (2d Dept. 1977).

Turning to the award of counsel fees to plaintiff, the County defendant argues that in the interest of justice the district court should have denied such fees. The chief reasons given are that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, was enacted after plaintiff Holley commenced her action, so that she had neither a need for such a fee to guarantee access to the courts nor a reasonable expectation of obtaining one; that the legal services available to plaintiff are federally funded; and that there was no bad faith by the County defendant here. But recent decisions of the Supreme Court and of this court make clear that none of these factors prevents an award of attorneys' fees as a matter of law. See, e.g., Hutto v. Finney, 437 U.S. 678, 693-700, 694 n.3 (1978); Gagne v. Maher, 594 F.2d 336, 345 (2d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3001 (June 21, 1979) (No. 78-1888); Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34 (1978). Nor is it a bar to such an award that the district court never decided the constitutional issue that was the basis of jurisdiction under 28 U.S.C. § 1343(3). Gagne v. Maher, supra, 594 F.2d at 339-41. The attorneys' fees issue is committed to the discretion of the trial judge, id. at 345, who in this case pointed out

> The plaintiff sought and obtained broad equitable relief which will benefit resident aliens in addition to the plaintiff. Although the size of the group affected by this litigation may not be large, the claim involved significant federal rights. Because the plaintiff's claim did not involve substantial monetary damages and is one which

> many United States citizens would regard as unpopular, it is highly unlikely that the plaintiff could have retained other counsel to act on her behalf. The cost of this litigation and the time and effort required by plaintiff's counsel in order to bring the case to its conclusion, especially in light of the two appeals involved, plainly were disproportionate to any sum the plaintiff might reasonably have expected to recover on her own behalf. All of these circumstances justify an award of fees to the plaintiff.

464 F. Supp. at 725. We see no abuse of discretion here.

Appeal of the State Defendant

The State was successful below on its Eleventh Amendment claim and a number of its arguments on appeal are merely supportive of the County defendant's position. Thus, as already noted, the State defendant argues that since the County defendant is an arm of the State for Eleventh Amendment purposes, retroactive payments were improper and that an award of attorneys' fees against either defendant was inappropriate, particularly since the Eleventh Amendment, as the district court recognized, barred the damage award against the State defendant. We see no need to add to our previous discussion except to point out that Hutto v. Finney, supra, 437 U.S. at 693-98, specifically rejected the latter argument. See also Gagne v. Maher, supra, 594 F.2d at 341-43.

At oral argument, the State also contended that under the Supreme Court's very recent decision in Chapman v. Houston Welfare Rights Organization, 47 U.S.L.W. 4528 (May 14, 1979), the district court did not have jurisdiction over plaintiff's claim that section 131-k conflicted with federal law. *Chapman* held that 28 U.S.C. § 1343(3) and (4) did not independently give federal district courts jurisdiction over such claims, confirming our

earlier ruling in Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975). But jurisdiction over the statutory claim here is not original, but pendent, as we held in our two prior opinions in this case. We do not read *Chapman* as barring the exercise of jurisdiction over the pendent claim here, which, as we see it, could be based upon either a federal or state cause of action. As to the former, it has generally been assumed that there is a federal cause of action to enforce the Social Security Act and HEW Regulations and that such "suits in federal court under § 1983" are proper, see Edelman v. Jordan, supra, 415 U.S. at 675-77; Rosado v. Wyman, 397 U.S. 397 (1970).[12] Although Justice Powell took the position in *Chapman* that there is no cause of action under section 1983 for violations of the Social Security Act, 47 U.S.L.W. at 4534-40 (Powell, J., concurring), only two other Justices joined in this view, while four Justices disagreed and two took no position.[13] The Justices did not deal with whether a private cause of action could be implied directly from the Social Security Act, see, e.g., Cannon v. University of Chicago, 47 U.S.L.W. 4549 (May 14, 1979); Cort v. Ash, 422 U.S. 66, 78 (1975), which a federal district court would have jurisdiction to hear under the general federal question statute, 28 U.S.C. § 1331(a). Of course, welfare benefits cases do not ordinarily involve $10,000 so that the jurisdictional amount requirement would generally not be satisfied in suits

[12]Of course, since the cause of action does not meet the jurisdictional requirements of 28 U.S.C. §1343(3), it has had to be presented as a pendent claim to another §1983 cause of action that asserts a violation of a right secured by the Constitution or any Act of Congress providing for equal rights, and therefore does meet the requirements of §1343(3).

[13]Justice Powell's opinion was joined by Chief Justice Burger and Justice Rehnquist. Justice White, also concurring, disagreed with Justice Powell on this point, as did Justice Stewart in his dissenting opinion, joined in relevant part, by Justices Brennan and Marshall. Justices Stevens and Blackmun did not find it necessary to reach the issue, see 47 U.S.L.W. at 4533.

against state defendants.[14] But the absence of the jurisdictional amount should not be controlling here when the district court already has jurisdiction over the equal protection claim. Moreover, plaintiff also has a state cause of action. The State defendant itself points out that plaintiff could have sued in the state courts for wrongfully withheld benefits, see Papadopoulous v. Shang, 414 N.Y.S.2d 152 (App. Div. 1st Dept. 1977). Under United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the district court had discretion to exercise jurisdiction over such a state cause of action. Certainly on these facts, the federal court is an appropriate forum to adjudicate the claim of conflict between federal and state law. See Hagans v. Lavine, 415 U.S. 528, 548 (1974); Rosado v. Wyman, supra, 397 U.S. at 422-23; Andrews v. Maher, supra, 525 F.2d at 120. Cf. Frost v. Weinberger, 515 F.2d 57, 62 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976). See also Friendly, Federal Jurisdiction: A General View 123 (1973).

The State defendant also briefly attacks the scope of the declaratory and injunctive relief granted by the district court. The injunction requires the defendants to abide by the HEW regulation; indeed, the language of the order is the language of the regulation. We see neither failure to follow our earlier mandate nor overbreadth in this. The rest of the State's brief is an anticipatory defense to arguments of plaintiff in her cross-appeal, to which we now turn.

[14]There is now no such an amount-in-controversy requirement for suits against federal defendants, see 28 U.S.C. §1331(a), as amended by Pub. L. No. 94-574, §2, 90 Stat. 2721 (1976). In 1978, the House of Representatives passed legislation that would remove the jurisdictional amount requirement in federal question cases, H.R. 9622, 95th Cong., 2nd Sess., 124 Cong. Rec. 1553, 1569 (Feb. 28, 1978), and both houses of Congress are currently considering such bills.

Cross-Appeal of Plaintiff

In her cross-appeal, which is concededly filed for protective purposes only, plaintiff argues at great length that the district court erred in not granting damages against the State as well as against the County. Plaintiff offers an elaborate theory to justify that result. First, she asserts her constitutional claim as an implied right of action based directly on the equal protection clause of the Fourteenth Amendment, under Davis v. Passman, 47 U.S.L.W. 4643 (June 5, 1979); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (en banc). She argues for the right to assert this implied action even though she has an explicit right of action under 42 U.S.C. § 1983 because under that section she cannot get retroactive relief from the State. See Quern v. Jordan, 47 U.S.L.W. 4241 (March 5, 1979). Second, plaintiff deals with the problem of jurisdiction for this *Bivens*-type action as follows. General federal question jurisdiction under 28 U.S.C. § 1331 is unavailable because, as we have previously held, 529 F.2d at 1295, the jurisdictional amount is not met. However, plaintiff asserts that pendent jurisdiction is available and that the Fourteenth Amendment claim can be appended to her identical section 1983 claim, over which the district court had jurisdiction under 28 U.S.C. § 1343(3), which requires no jurisdictional amount. Next, plaintiff urges that the State's action in depriving her sub-class of illegal aliens of AFDC benefits violates the equal protection clause. Finally, she claims that the Eleventh Amendment does not protect states against damage actions brought directly under the Fourteenth Amendment.

Merely stating this complicated theory indicates the scope of the problems involved in ruling upon it. For example, decision for plaintiff would require at the very least determination of the equal protection question on the merits, something which none

of the courts that have considered this case have done to date. It would also require holding that an implied right of action under the Fourteenth Amendment overrides the Eleventh Amendment. This would be a rather large extension of the Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that Congress, acting pursuant to section five of the Fourteenth Amendment, can override the Eleventh Amendment by manifesting an explicit intent to do so in a statute, Title VII in that case. Cf. Jagnandan v. Giles, 538 F.2d 1166, 1182-85 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977). However, we see no persuasive reason to consider these matters. We have already concluded that plaintiff is entitled to a judgment against the County defendant for the same amount she could recover against the State defendant. Under the circumstances, we will leave to another day consideration of plaintiff's alternative theory.

In conclusion, on the appeal of the County and State defendants, we affirm the judgment of the district court in all respects. We dismiss plaintiff's cross-appeal. In our discretion, we direct that no additional amount for attorneys' fees and no costs be awarded to either party in connection with these appeals.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of July one thousand nine hundred and seventy-nine

United States Court of Appeals
Second Circuit
Filed Jul 13 1979
A. Daniel Fusaro, Clerk

Present: HON. HENRY J. FRIENDLY, *Circuit Judge;* HON. WILFRED FEINBERG, *Circuit Judge;* HON. EDWARD R. NEAHER, *District Judge.*

GAYLE McQUOID HOLLEY, Individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, AND ADELAIDE McQUOID, her minor children,

Plaintiff-Appellant-Cross-Appellee

v.

BARBARA B. BLUM, as Commissioner of the New York State Department of Social Services (successor in office and function to Abe Lavine, etc. et ano.,

Defendants-Appellees-Cross-Appellants.

79-7182, 79-7190, 79-7207

Civ-75-151

APPENDIX C (Judgment of the Court of Appeals)

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed and the cross-appeal dismissed without costs in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

BY: SARA PIOVIA,
Deputy Clerk

APPENDIX D

(Constitutional Provisions and Statutes Involved)

Eleventh Amendment to the Constitution of the United States:

ARTICLE XI

Judicial power of United States not to extend to suits against a State.—The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Constitution of the State of New York

ARTICLE XVII

SOCIAL WELFARE

Section 1. The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

42 United States Code, Section 602(a)(1)(3)

§602. State plans for aid and services to needy families with children

(a) Contents

A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

• • •

(3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the

APPENDIX D
(Constitutional Provisions and Statutes Involved)

establishment or designation of a single State agency to supervise the administration of the plan;

(1976 Edition)

New York Social Services Law, Section 153

§153. Reimbursement and advances by the state

1. Expenditures made by social services districts, cities and towns for public assistance and care and its administration, pursuant to this chapter, shall, if approved by the department, be subject to reimbursement by the state, in accordance with the regulations of the department, as follows:

There shall be paid to each such district, city or town

a. the amount of federal funds, if any, properly received or to be received on account of such expenditures;

b. the full cost of assistance and care provided state charges, after first deducting any federal funds properly received or to be received on account thereof;

(c) the full amount expended on behalf of the department for public assistance and care furnished under this chapter to mentally ill, mentally retarded or epileptic persons placed in family care on conditional release from an institution in the state department of mental hygiene and for the administration thereof, after first deducting therefrom any federal funds properly received or to be received on account thereof;

(d) fifty percentum of the amount expended for public assistance and care for local charges, after first deducting therefrom any federal funds properly received or to be received on account thereof;

(e) fifty percentum of the amount expended for administration of public assistance and care to state and local charges, after first deducting therefrom any federal funds properly received or to be received on account thereof. The provisions of this paragraph shall not be applicable to expenditures for administration expressly provided for in paragraph e;

(f) the full amount expended for administration of public assistance and care to eligible needy Indians and members of their families residing on any Indian reservation in this state, after first deducting therefrom any federal funds properly received or to be received on account thereof.

(g) fifty per centum of the amount expended for narcotic addiction and drug abuse rehabilitative and preventive services pursuant to this chapter, after first deducting therefrom any federal funds properly received or to be received on account thereof. In the event funds appropriated for such services are insufficient to provide full reimbursement of the total of the amounts claimed by all social services districts pursuant to this section then reimbursement shall be in such proportion as each claim bears to such total.

(h) after deducting any federal funds properly received or to be received on account thereof, the full cost of services, including the cost of administration thereof, provided to a person eligible for services under title seven of article five of this chapter when such person has been discharged or released or conditionally released from a state department of mental hygiene facility or from conditional release pursuant to sections 29.11, 29.15, 31.13 or 31.15 of the mental hygiene law and when such person was

admitted to such facility and has been a patient therein for a continuous period of five or more years prior to his discharge or release. Such reimbursement shall not continue beyond a five year period beginning at the date of such discharge or release. For purposes of determining whether a person has been a patient in such a facility for a continuous period of five years or more, if a person who has been discharged or released from such a facility is thereafter returned to such a facility within ninety days of the discharge or release, the period of time between such discharge or release and such return shall not constitute an interruption of, and shall be counted as part of, the continuous period.

2. The following expenditures made by public welfare districts for hospital care furnished pursuant to the provisions of this chapter to recipients not eligible to receive medical assistance for needy persons shall be subject to reimbursement by the state in accordance with and to the extent authorized by the provisions of subdivision one:

a. expenditures for such care for state charges, except as provided in subdivision four of section sixty-two;

b. expenditures for such care for local charges, in the case of children under the age of twenty-one years cared for away from their own homes in accordance with the provisions of title two of article six;

c. expenditures for such care for local charges, in the case of and in connection with births of children born out of wedlock, in accordance with the provisions of title two of article six;

d. expenditures for such care for local charges, in the case of neglected, abused, abandoned or destitute children who have been remanded, discharged or committed pursuant to the family

court act of the state of New York. Hospital care in such case shall be deemed to have been furnished pursuant to the provisions of this chapter.

Nothing in this title shall be construed to authorize reimbursement for expenditures for hospital care for local charges except as specifically provided in this subdivision. Any inconsistent provision of this chapter or other law notwithstanding, expenditures for hospital care shall be subject to reimbursement by the state under this title only when the investigation of the application for such care and the decision and the authorization to furnish such care is made by the county or city public welfare official who holds the position and has the title of commissioner or director of welfare, public welfare or social welfare or any similar position and title denoting him to be the administrative head of the welfare department of the county or city, as distinguished from any other department thereof which also may under certain circumstances administer public assistance and care, or by an employee of such welfare department duly authorized for the purpose by such county or city public welfare official.

3. a. For the purpose of this title, expenditures for administration of public assistance and care shall include expenditures for salaries of the chief executive officers, their deputies and the employees of local welfare departments; operation, maintenance and service costs; and such other expenditures, such as equipment costs, depreciation charges, and rental values as may be approved by the department. It shall not include expenditures for capital additions or improvements.

b. State reimbursement shall not be made for any part of the salary of a chief executive officer of a social services department, whose qualifications do not conform to those fixed by the department or of a city or town service officer; nor shall such

reimbursement be made on the salary of a deputy commissioner or an employee, unless his employment is necessary for the administration of public assistance and care and his qualifications conform to those fixed by the department.

4. For the purpose of this title, expenditures made by social services districts, cities and towns for the care and maintenance of neglected, abused, abandoned or destitute children who had been remanded, discharged or committed pursuant to the family court act of the state of New York shall, if approved by the department, be subject to reimbursement by the state in accordance with and to the extent authorized by the provisions of subdivision one.

5. In the event the state elects to claim and receive federal aid payments in accordance with the alternative formula authorized by the provisions of section eleven hundred eighteen of the social security act, for expenditures made under the state's approved plan for aid to dependent children, a social services district shall, notwithstanding such election, be entitled to receive a state reimbursement, in accordance with and to the extent authorized by subdivision one. for its approved monthly expenditures for aid to dependent children, the amount it would have been entitled to receive if such election had not been made, until the month the amount it would be entitled to receive as state reimbursement for its approved expenditures for such program of assistance for such month, as a result of such election, is equal to or greater than such district would have been entitled to receive therefor if such election had not been made by the state, any inconsistent provision of law notwithstanding.

6. a. Claims for state reimbursement shall be made in such form and manner and at such times and for such periods as the department shall determine.

b. When certified by the department state reimbursement shall be paid from the state treasury upon the audit and warrant of the comptroller out of funds made available therefor.

c. When the monies allotted to the state by the federal security agency, or other authorized federal agency, for aid to dependent children for any quarter shall have been received by the department of taxation and finance, the department shall, as soon as possible, certify to the comptroller the amount to which each social services district is entitled for such quarter and such amount shall be paid out of the state treasury after audit by the comptroller to the respective social services districts.

d. The department is authorized in its discretion to make advances to public welfare districts and to cities and towns in anticipation of the state reimbursement provided for in this section.

7. Payment of state reimbursement and advances shall be made to the fiscal officer of the public welfare district or city entitled thereto pursuant to the provisions of this chapter; and in counties where home relief is a town charge, such payment as the towns therein shall be entitled to shall be made to the fiscal officer of the county for the account of and reimbursement to such towns, except in the case of a town which is a public welfare district.

8. Any inconsistent provision of the law or regulation of the department notwithstanding, state reimbursement shall not be made for any expenditure made for the duplication of any grant and allowance for any period, except as authorized by subdivision twelve of section one hundred thirty-one of this chapter.

9. Any inconsistent provision of this chapter or other law notwithstanding, any loss of federal funds assessed by the depart-

ment of health, education and welfare against the state by reason of the failure of one or more social services districts to comply either with paragraph (e) of subdivision one of section three hundred fifty and paragraph (c) of subdivision four of section three hundred sixty-five-a relating to family planning services for eligible individuals or with paragraph (g) of subdivision one of section three hundred fifty relating to child health screening and resulting treatment, shall be charged to and borne by the social services districts responsible for such loss. Each such district shall bear only so much of any such loss as is attributable to its failure so to comply. The amount to be borne by a district shall be determined by applying the ratio that the number of cases in which it failed to comply with either family planning or child health screening and treatment requirements, or both, bears to the total number of cases in the state in which there were failures to comply with either such requirement, or both, as the case may be. A district shall have an opportunity to be heard before the department's final determination to impose such an assessment.

(As amended by Law 1978, Chapter 555)